

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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4 Federal Trade Commission,

5 Plaintiff,

6 vs. Case No. 08-6379

7 Ovation Pharmaceuticals, Inc.,

8 Defendant.

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10 State of Minnesota,

11 Plaintiff,

12 vs. Case No. 08-6381

13 Ovation Pharmaceuticals,

14 Defendant.

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17 THE HONORABLE JEANNE J. GRAHAM

18 United States Magistrate Judge

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21 TRANSCRIPT OF PROCEEDINGS

22 * * *

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24 Date: February 6, 2009

25 Reporter: Leslie Pingley

1 APPEARANCES

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MR. KYLE E. CHADWICK, MR. MARKUS H. MEIER

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and MR. ROBERT CANTERMAN, Attorneys at Law,

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601 New Jersey Avenue NW, Washington, DC 20580 appeared

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on behalf of the Federal Trade Commission.

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MR. ALAN GILBERT, MR. GABRIEL R. GERVEY

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and MS. KRISTEN M. OLSON, Attorneys at Law, 445

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55101 appeared on behalf of the State of Minnesota.

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MR. SEAN M. BERKOWITZ, Attorney at Law,

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233 South Wacker Drive, Suite 5800, Chicago, Illinois

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60606 appeared on behalf of named Defendant.

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MR. STEVE W. GASKINS, Attorney at Law,

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Minnesota 55402 appeared on behalf of named Defendant.

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1 P R O C E E D I N G S

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3 (NO REPORTER WAS PRESENT - The following
4 transcript was prepared from a COPY of the
5 original court recording)

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7 THE COURT: We are here in the matter
8 of Federal Trade Commission vs. Ovation as well
9 as the State of Minnesota vs. Ovation. Civil
10 File No. 08-6379 and 08-6381. Assigned to
11 District Court Judge Joan Ericksen and myself
12 Jeanne Graham as Magistrate Judge and we're here
13 today for a Rule 16. I usually do these in my
14 chambers, but my chambers just aren't big enough,
15 so here we are and I decided since we're all in
16 here in the court room and I have got my robe on
17 and everything we'll go ahead and record it, so
18 we're on the record.

19 May I have appearances first by the
20 Federal Trade Commission.

21 MR. CHADWICK: Your Honor, for the
22 Federal Trade Commission, Kyle Chadwick and with

23 me is Mark --

24 Shall I approach, Your Honor?

25 THE COURT: No, you can just stand.

4

1 MR. CHADWICK: Kyle Chadwick. With

2 me is Markus Meier and also Robert Canterman.

3 THE COURT: Okay. And who's going to
4 be arguing, today?

5 MR. CHADWICK: I will, Your Honor.

6 THE COURT: Well, not arguing.

7 We're in a Rule 16. I'm hopefully not going to
8 have a lot of argument.

9 How about for the State of Minnesota?

10 MR. GILBERT: Your Honor, my name is
11 Alan Gilbert representing the State along with
12 Kristen Olson and Gabriel Gervev.

13 THE COURT: Mr. Gilbert, are you
14 arguing?

15 MR. GILBERT: Yes, I will.

16 THE COURT: All right. And how about
17 for Ovation?

18 MR. GASKINS: For Ovation, Your
19 Honor, Steve Gaskins, Flynn Gaskins & Bennett
20 along with Sean Berkowitz from Latham & Watkins

21 and Mr. Berkowitz will be doing --

22 THE COURT: Arguing or discussing.

23 We will all be discussing now. Now, from here on
24 out we can just stay at the counsel table, all
25 right, and you can just talk into those

5

1 Microphones there. You can remain seated. Okay.

2 I would like to start with just the
3 scheduling piece and things have been discussed,
4 but before we actually get to that, before I even
5 ask you about your positions on this, I think I
6 need to know what the universe of this case is.
7 I have a suspicion you have folks have been going
8 through this awhile, so I need to know what's
9 been done up to now and kind of where we are at,
10 so I was going to have the FTC start. Let us
11 know from your angle where do you think you are.

12 MR. CHADWICK: Certainly, Your
13 Honor, just briefly I'm sure the Court has read
14 the papers, but the FTC is challenging the
15 legality of a practical transaction --

16 THE COURT: Right.

17 MR. CHADWICK: -- which was the
18 acquisition of rights to a drug.

19 And we're also seeking disgorgement as
20 one of our remedies, so we will need some
21 discovery into really both the circumstances
22 surrounding the transactions of both of the
23 acquisitions of both drugs. There was one in
24 late '05 and one in early '06 and we will need
25 some financial discovery in order to calculate

6

1 the damages because it's not -- it's not damages
2 as the reason. It's disgorgement amount that
3 we're alleging that was unlawfully acquired, so
4 it's not information we have any access to. It
5 has to come from the defendant's books.

6 At this point we have -- both sides
7 actually have exchanged document requests and we
8 have had some very productive discussions about
9 production of documents. We haven't -- we
10 anticipate any day now -- we haven't quite gotten
11 our production from defendants. The FTC did
12 acquire a certain number of documents in the
13 pre-complaint investigation, but not anything
14 like we would need for the case, so that's where
15 we are and we have produced virtually all of the
16 documents, both from defendants itself and from

17 third parties that we obtained in that
18 investigation. So we're close to exchanging
19 documents, but we haven't seen what defendant has
20 yet.

21 THE COURT: Okay. And is -- what I
22 am trying to get a handle on is what the
23 pre-complaint investigation looked like. Were
24 there depositions? Was it just looking at
25 documents? What kind of --

7

1 MR. CHADWICK: It was largely -- it
2 was documents, first of all. It was voluntarily
3 produced documents. The Government did not issue
4 any compulsory process. As we understand it,
5 Ovation did a search of some limited number of
6 document custodians.

7 There were two rather short what are
8 called FTC investigational hearings which are
9 under oath. They are not technically depositions
10 and that one -- one was of an Ovation employee
11 and one was an employee of one of the selling
12 companies, so that was the extent of it.

13 THE COURT: Okay. Let me here from
14 the state and then I will hear from Ovation.

15 MR. GILBERT: Thank you, Your Honor.

16 The State is working closely with the FTC on this
17 particular matter. The claims are similar,
18 although some of the legal bases for the claims
19 are different obviously. We have anti-trust
20 claims under both Federal and State law, unjust
21 enrichment claim in terms of a remedy.

22 We intend to work closely with the FTC in
23 the discovery stage of this as well as at the
24 trial and to the extent the FTC has received
25 documents already, we are privy to those

8

1 documents and have discussed those with the FTC.

2 THE COURT: Okay. All right. Okay.
3 How about from Ovation?

4 MR. BERKOWITZ: We have a slightly
5 different view, Your Honor. Obviously our
6 position with respect to the merits of the case,
7 I think, is set forth in our disclosure and you
8 have inquired about the status of discovery.

9 Beginning last spring the FTC requested
10 materials from Ovation on a voluntary basis eight
11 months before the Complaint was filed. In a
12 series of four or five productions we produced

13 over 9,000 documents consisting of almost 50,000
14 pages of materials. We have also made extensive
15 presentations to the FTC about the merits of the
16 case, bringing voluntarily people from the
17 company, outside consultants and so forth, in
18 meetings and extensive written presentations to
19 them about our position.

20 We also voluntarily produced an
21 individual for a deposition, investigative
22 transcript which we received only recently.

23 When the case was filed in December, we
24 asked, although it was around the holidays, we
25 asked for an early pre-trial conference and we

9

1 had one at the end of December at which time we
2 talked about the exchange of documents.

3 We only recently received documents that
4 the FTC had on -- in an initial wave of
5 production I believe about ten days ago ask and
6 similarly from the State of Minnesota.

7 I don't know for certain whether we have
8 all of the documents that they have collected
9 during the eight months of investigation that
10 they had.

11 If they are representing to the Court
12 today that we have 100 percent of all the
13 documents they have including third party
14 documents, I am surprised but I am happy to hear
15 that. We have had discussions and debates with
16 them about the third party documents that they
17 have collected. There was an issue related to a
18 protective order in place and they didn't produce
19 documents claiming that the protective order was
20 delaying the production of those documents to us.

21 We had asked to get a sense of the scope
22 of those documents and clearly non-privileged
23 documents including, for example, what the scope
24 of the request was, the identifies of the third
25 parties and I don't think that we received that

10

1 to date.

2 With respect to the protective order
3 issue, we have now reached a preliminary
4 agreement with one caveat and I think you're
5 aware of that. With the preliminary agreement I
6 think would allow for production of materials to
7 us of all third party documents with the issue of
8 in-house counsel having access as the one that we

9 can talk about at a later time.

10 THE COURT: Okay.

11 MR. BERKOWITZ: We are anxious to
12 move forward as quickly as possible. We are
13 going to comply with the date that is required
14 under our schedule for production of our
15 documents and I don't think it's fair to say that
16 we've been holding back. We have provided
17 extensive pre-complaint discovery and we are
18 working along with the schedule that we've
19 agreed. We've come up with a search term
20 limitation with the FTC and I think we've been
21 working expeditiously to get those documents
22 which we will have to them consist with the
23 schedule that we had proposed.

24 THE COURT: All right. Well, okay.
25 That gives me a better idea.

11

1 What does a trial look like in this case?
2 Both sides agree it's a bench trial, all sides I
3 mean?

4 MR. CHADWICK: Yes, Your Honor.

5 MR. BERKOWITZ: Yes.

6 THE COURT: Okay. So what does a

7 trial look like and how is the trial different
8 from dispositive motion practice?

9 MR. CHADWICK: The issues at trial
10 would be, among others things, we as we
11 understand it, Ovation is not admitting that
12 these two drugs actually compete. There would
13 have to either some dispositive disposition for
14 that order or that would be an issue at trial.

15 There would certainly be the issue of the
16 amount of disgorgement and the remedy, equitable
17 remedy other than disgorgement that would need to
18 be tried.

19 THE COURT: Is it witnesses that you
20 anticipate at a trial or will it -- you know, is
21 the summary judgment motion with all of the
22 exhibits that you might put in basically that
23 same issue?

24 MR. BERKOWITZ: I mean certainly
25 from Ovation's perspective we are confident that

12

1 we'll be able to make a very effective
2 presentation in summary judgment. We would hope
3 that that would resolve the case.

4 Obviously we don't know all of the

5 information that the FTC has gathered and we're
6 looking into that to see whether on the key
7 issues there truly are issues of material fact.
8 I think our position is this is a case that's
9 ripe at least for portions, if not the entire
10 portion, to be resolved at the summary judgment
11 stage based on what we believe to be the clear
12 record consistent with what we communicated to
13 them.

14 They obviously have a different view and
15 I think we need to conduct some discovery in
16 order to make that determination.

17 THE COURT: Okay.

18 MR. GILBERT: Your Honor, we agree
19 with that assessment about the FTC and the
20 defendants. I think we have to wait and see
21 whether summary judgment is appropriate or not.
22 It could conceivably be.

23 We anticipate though that there will be
24 the need for, excuse me, expert testimony and how
25 that might pan out we'll have to wait and see as

13

1 well.

2 THE COURT: And how long of a trial,

3 if you had to go to trial, are you thinking
4 about?

5 MR. GILBERT: We have discussed it
6 with the FTC and we're thinking two weeks.

7 THE COURT: Two weeks.

8 MR. GILBERT: Uh-huh.

9 MR. BERKOWITZ: Your Honor, I
10 think --

11 THE COURT: Other than you'd like
12 that to be shorter, do you have any -- would you
13 think it would be longer than that I guess? I
14 always like to know what the outside chance is
15 for --

16 MR. BERKOWITZ: I guess the question
17 is if their case in chief is a week, we probably
18 want a week as well, so if that's what they are
19 talking about, I think that that's consistent
20 that we would want an equal amount of time.

21 THE COURT: Okay. All right. That
22 helps. Okay.

23 With all of that information, let me go
24 through my worksheet then and I will tell you
25 based on everything I have read and if you have

1 certain comments, I will allow you to address
2 them.

3 At the Rule 16 it's a little bit more of
4 a cooperative effort to try to figure out how we
5 are going to do it and then if you have a dispute
6 I would make the call and then we're done, but so
7 my first -- my first area is initial disclosures
8 and we don't have a date for that. Now, normally
9 that's two to three weeks after we have a Rule
10 16.

11 Does that sound okay for everyone?

12 MR. CHADWICK: We have actually done
13 that, Your Honor.

14 THE COURT: That's what I thought,
15 yes. So that's been completed.

16 I should let you know what's going on
17 right from the beginning. I even think that the
18 defenses -- not the defenses. The State and the
19 FTC's suggestions regarding how fast this can go
20 is a pretty aggressive program, so I am not going
21 with Ovation on this one. I know you want to get
22 it done quickly, but the reality of where we are
23 in Federal Court, in other words, I have got to
24 think about where Judge Ericksen may possibly be
25 in terms of being able to get you in for a trial

1 realistically even.

2 MR. BERKOWITZ: And, Your Honor, we
3 certainly -- everything that we suggested is, of
4 course, subject to the Court's schedule, what we
5 want to communicate and I think we would like to
6 do things as quickly as we can.

7 THE COURT: And that is fine. I
8 think -- I think if we go with primarily, in
9 essence, the suggestions of the plaintiff's in
10 this case that we are going pretty much as
11 quickly as we can. I will put out there right
12 now that I even tried to make a phone call so
13 that I could find out from Judge Ericksen's
14 chambers, I don't usually, but it's usual -- let
15 me just be honest, the last anti-trust case I had
16 was two years, so this is -- this is not quite --
17 there's a lot of smaller issues here thankfully,
18 but you know, they have the potential, as you
19 know and Judge Ericksen, I know, has got a ton or
20 her plate, so this was the message and so now we
21 work backwards and I think if we do it primarily
22 on the Governments, and I am just going to call
23 you guys the Government table, if we do primarily
24 their schedule we can fit it in, but even then
25 she will not have time for a particularly -- like

1 a two-week trial until September, so there's not
2 much I can do about that. Even taking their
3 deadlines, she requires four months between
4 dispositive motions and trials now, so it's a
5 little bit different.

6 But even for me to say to you that they
7 could maybe get you in in September is a victory
8 for everyone. That's fast here, so -- I mean
9 unless it's a TRO or something, but that's pretty
10 darn good.

11 So what I will do, I think, based on
12 everything I am hearing then is you will hear
13 dates that are primarily submitted by the
14 Government and then I will have some questions.

15 So having said that, fact discovery
16 deadline will be 4/17/09, so work away quickly.
17 I don't know how you will get 15 depositions done
18 between now and then with the old -- let's see,
19 Mr. Berkowitz, where are you from again?

20 MR. BERKOWITZ: I am from Chicago,
21 Your Honor.

22 THE COURT: So understand. March is
23 get out of winter mode, but do whatever you guys
24 can to get those done.

25

MR. BERKOWITZ: They seem to have a

17

1 lot of people at their table, so we will have to
2 see if we can come up with enough to cover those
3 depositions, but we will do our part, Your Honor.

4 THE COURT: The other thing you can
5 do, and I am fine with -- if you folks, no matter
6 what I say here today, if everyone is working
7 hard and you folks come up with a stipulation to,
8 you know, modify what we're going to say today, I
9 pretty regularly allow you as the experts of the
10 case to do that.

11 If it starts getting into multiple,
12 dragged out requests for continuance, then I
13 stick my nose in it. Otherwise, the other thing
14 that sometimes happen is people will agree to do
15 certain depositions after the discovery deadline
16 and that's fine with me too.

17 MR. BERKOWITZ: What may be helpful,
18 Your Honor, in that regard, because I understand
19 that it's aggressive, it is, to really find out
20 who's going to be at trial and who's not.

21 The last thing that we want to do is
22 depose people who are not going to be at trial

23 and not truly relevant, to make sure that we work
24 together towards doing that and truly identify
25 the people that are the appropriate ones and I

18

1 think we may be working towards that in their
2 initial disclosures. They have identified over
3 20 institutions without a particular individual
4 and I think just yesterday we received a more
5 narrow list and if we could continue working in
6 that vain to make sure that our efforts are
7 targeted towards trial preparation as opposed to
8 scatter shot, that would be great.

9 THE COURT: Okay.

10 MR. GILBERT: Sure. We absolutely
11 agree, Your Honor.

12 MR. CHADWICK: As do we.

13 THE COURT: Then while your language
14 is a little different than I usually do, I'm fine
15 plugging in basically your language on
16 interrogatories, all of the discovery pieces;
17 interrogatories, document requests, admissions
18 and fact depositions.

19 You seem to have worked out some language
20 regarding that and how you kind of want that to

21 go, am I correct in that?

22 MR. GILBERT: Yes, Your Honor.

23 THE COURT: Pages 14 and 15, I will
24 even add Paragraph 6 from the bottom of 14 to 15.
25 I may even steal some of this language some day

19

1 because it's obviously a way to work out, you
2 know, kind of how multiple parties in different
3 cases might be able to proceed, so I am adding
4 all of that in, so you get all that.

5 As far as the experts are concerned, this
6 is the way I look at experts: I say -- I look at
7 whatever the top number is and then I say each
8 side, so you know, each side gets up to five and
9 what I'm hopeful is that the plaintiffs on each
10 side, you know, that we won't see five in one and
11 five in the other. Hopefully you will just have
12 five. I am not going to order that only because
13 I think they are different cases, but I am
14 assuming that you'll work to that.

15 MR. GILBERT: We will, Your Honor.

16 THE COURT: All right. Then I am
17 going -- because of that and because of where I
18 cutoff now discovery, I am going with the

19 plaintiff's schedule regarding identification and
20 reports of rebuttal. Let's see. Let me just
21 look at something here.

22 Do you have -- what page are we on? We
23 are on 16. Okay. So you have identification
24 April 24th, you have reports on that same day and
25 then you just -- so you're not splitting up

20

1 identification and report dates. You're just
2 doing -- you're going to turnover reports that's
3 going to have the identification right there and
4 then they will a month to return one back?

5 MR. CHADWICK: Your Honor, that was
6 our proposal. I think the defendant wanted to do
7 them staggered. Our idea was to have any
8 affirmative report on which --

9 THE COURT: Well, let's talk about
10 that. Your idea was to stagger them. We'll
11 stretch it a bit more, so it depends on whether
12 you want more time or if you do want
13 identification first and --

14 MR. BERKOWITZ: I think that we
15 prefer to go with our schedule, assuming that
16 it's still -- given that we're now talking about

17 September date if it wouldn't be -- wouldn't put
18 it outside the realm.

19 THE COURT: Well, what you're doing
20 is identifying -- let's talk about that for a
21 second. You're identifying and then reporting,
22 which is something that, you know, happens here
23 often --

24 MR. BERKOWITZ: But --

25 THE COURT: But you're doing it in

21

1 the middle of discovery with the end being the
2 discovery cutoff basically.

3 MR. BERKOWITZ: You know, at this
4 stage if -- you know, we had hoped to get early
5 identification very early on. I don't know if
6 they are going to be able to identify them. You
7 were going to be using the April date as -- as
8 the date for their identification we probably
9 would be fine with that being the date that
10 reports are issued as well, as long as we get a
11 chance to rebut those reports.

12 THE COURT: Do you -- do you think if
13 they identify and report on April 24th you would
14 have -- is that just four weeks? What I have

15 done, just so you know, sometimes when it's the
16 plaintiff doing the identification report all at
17 once, I give them like an extra week or so to --
18 instead of just four weeks I will do like a five
19 week period so that they have a little bit more
20 time to find the experts and get them to report,
21 but since you made --

22 MR. BERKOWITZ: So far if our date
23 can be a month or five weeks after their's, that
24 would be great.

25 THE COURT: Yes. Okay.

22

1 MR. GILBERT: Your Honor, if I may,
2 the one concern we have about the sequence is
3 that particularly given that Ovation has asserted
4 some affirmative defenses in this case, we would
5 like, and it was part of our schedule, that we
6 would have the opportunity to have a rebuttal
7 report to any affirmative report that defendant
8 put forth.

9 THE COURT: Well, the other way -- I
10 sometimes do this as party with the burden of
11 proof, I just want to make sure that everyone
12 isn't going to fight too much about what the

13 burden of proof is. I mean if you have an
14 affirmative defense and you're putting up an
15 expert to talk about that defense, then that
16 would be your burden of proof.

17 MALE SPEAKER: That makes sense,
18 Your Honor. We would be comfortable with that --

19 THE COURT: All right. Let's do
20 that.

21 MALE SPEAKER: -- where we got the
22 burden on an affirmative defense to identify the
23 expert with the initial disclosure of April 24th.

24 THE COURT: All right. Let's do this
25 then, let's have party with the burden of proof

23

1 4/24/09. Rebuttal reports, whoever -- you know,
2 whoever 5/29/09.

3 Does that give you enough time do you
4 think?

5 MR. GILBERT: I think so, Your
6 Honor.

7 THE COURT: If not -- those are the
8 types of things that you might be able to
9 discuss. Okay. All right.

10 Then I still have an expert deposition

11 deadline of 6/19/09. That only gives you --
12 maybe I will put that back to 6/30/09 so you have
13 a full 30 days to talk to experts.

14 MALE SPEAKER: Thank you, Your
15 Honor.

16 THE COURT: Okay. 6/30/09 for
17 getting your depositions of your experts in.
18 Okay. And that gives you a little bit of leeway
19 between then and when trial would be. All right.

20 Motions to amend, that's pretty quick as
21 well, but I am not sure there's anything to
22 amend, so --

23 MR. BERKOWITZ: We wouldn't object
24 if they wanted to withdraw any claims at any
25 time. Short of that --

24

1 THE COURT: You could amend by
2 withdrawing claims, probably not, you know.

3 MR. BERKOWITZ: Or we can take an
4 apology.

5 THE COURT: My only concern is
6 that -- well, that's literally in two weeks. I
7 don't care if you want that to be the -- well, I
8 do care a little only because then I hear about

9 it. Let me do at least 3/2 or 3/6 I mean. That
10 gives you at least three weeks to kind of plow
11 through some things, both sides, you know, in
12 case you have something else.

13 MR. GILBERT: Just for clarification,
14 Your Honor, that's the date -- that would be the
15 date -- due date for filing a motion?

16 THE COURT: Serve and file, yes.

17 MR. GILBERT: Not on which it would
18 have to be heard?

19 THE COURT: Right.

20 MR. GILBERT: Okay. Thank you, Your
21 Honor.

22 THE COURT: I am a serve and file
23 judge, so is Judge Ericksen, so all of these
24 deadlines have to do with serving and filing by
25 then.

25

1 MR. BERKOWITZ: And just for our own
2 planning purposes, we understand that there's not
3 a presentation intention to amend the pleadings.
4 Obviously if that changes, you will let us know,
5 but I just want to make --

6 THE COURT: Yes.

7 MR. BERKOWITZ: -- should we be
8 expecting something?

9 MR. GILBERT: Not from the people at
10 this table, no.

11 THE COURT: Okay.

12 MR. CHADWICK: No, Your Honor.

13 THE COURT: Okay. And then the next
14 deadline is a court deadline, non-dispositive
15 motions that don't involve expert testimony and
16 things, those are due 12 weeks after your end of
17 discovery, so by 4/30/09 you serve and file any
18 motions on your discovery issues, non-dispositive
19 motions.

20 Punitive damages aren't even applicable
21 here, are they?

22 MALE SPEAKER: No, Your Honor.

23 MR. BERKOWITZ: We have no
24 objection.

25 THE COURT: Okay. That's good. All

26

1 right. Non-dispositive motions related to your
2 experts, this is not in my mind, a Daubert
3 motion. I think a Daubert motion is primarily a
4 District Court Judge trial issue, but if you have

5 things like hey, they served six expert reports
6 rather than five, whatever, you can do that by
7 6/30/09.

8 All right. Now, dispositive motion
9 deadline, before you had it at 5/22/09. We
10 hadn't really changed much.

11 MALE SPEAKER: Your Honor, could I
12 make a comment?

13 THE COURT: Yes.

14 MALE SPEAKER: The non-dispositive
15 as to experts is the same day as the last day for
16 expert depositions.

17 THE COURT: Yes, that one I do on
18 purpose because if it's about some -- if you're
19 literally having the unusual situation where
20 you're having that expert deposed on 6/30/09 and
21 you something comes up, just write me a letter.
22 You know, just call up, say can I write a letter
23 and write a letter and say, hey, we still need
24 this motion. I try not to drag it out too much
25 more and that's why we have it there.

27

1 So far we haven't had trouble with that
2 and for any of these dates, if you can't agree,

3 if you want to change something, if you want to
4 ask for something that isn't in here then another
5 way to do it is you call, you ask permission to
6 submit a letter because you have to do that with
7 the ECF now and then just write me a letter and
8 tell me what's going on. Okay.

9 MR. GILBERT: Your Honor, could I
10 clarify one point on the motions?

11 THE COURT: Yes.

12 MR. GILBERT: It's not inconceivable
13 in cases where a state like Minnesota is involved
14 that another state might have some interest and
15 might at some point want to join in a lawsuit.
16 I'm not saying that's going to happen here, but
17 to the extent I indicated we don't anticipate any
18 such thing happening, the State doesn't know if
19 that might happen here and it's conceivable that
20 it could, so I just want to be perfectly clear in
21 light of my prior comments as to what the
22 possibilities might be.

23 THE COURT: Okay. All right. All
24 right. All right. Let's go to dispositive
25 motions. I am fine keeping that where it is,

1 which is 5/22/09. That's just a serve and file
2 date and then you get your hearing scheduled and
3 then you have to follow Local Rules in terms of
4 submitting your papers and then the trial date
5 would necessarily come from her practice, as I
6 said, to do about four months, which is 9/21/09,
7 so 9/21/09 is when I have your trial date.

8 All right. No consent -- you know,
9 that's fine. I understand the no consent. You
10 might be able to get in sooner in front of me,
11 but honestly if you need to go to do both
12 dispositive motions and/or trial, this is
13 probably -- it's probably a pretty good schedule
14 for you.

15 In terms of informal dispute resolution,
16 a couple of things. I call informal dispute
17 resolution, that's not about settlement
18 conferences. That's about we have some out of
19 state counsel and if there's -- if there's a
20 motion that doesn't have to be done on the record
21 and formally, you know, your CEO can't appear at
22 the deposition that day and we're having a fight
23 about which day he has to appear, that's the
24 one -- that's the kind of thing you can write a
25 letter and we'll get you on the phone and we'll

1 do something more informally, if everyone agrees
2 to it because we're not going to have a formal
3 record.

4 The other piece is settlement and you may
5 not -- I don't know. I don't know yet what the
6 world is as to whether a settlement is a
7 possibility, probably not right now, but if you
8 get to a point you have a very fast schedule
9 here, but if this summer, for example, you want
10 to come in here and see about trying to have it
11 mediated, I'm certainly available for that and
12 that's what we do a lot of here. I don't know if
13 you folks know that, but that's one of our main
14 roles is to do some of the mediation, so if you
15 want to do that, you need to -- someone needs to
16 write me a letter. There's a theme here about
17 writing letters. Someone needs to write me a
18 letter and say you know what, we'd all like to
19 come the table, but I certainly would prefer it
20 to be all in this particular case and then here
21 are some dates, are some days, here are some
22 Mondays and Wednesdays in the next 30 to 60 days
23 from this letter that we can come in, especially
24 when you have out of town people. I like to try
25 to make sure it's a date that everyone can be

1 here in essence voluntarily.

2 If you get to a point where you're going
3 to have a trial, there's still a chance that
4 Judge Ericksen, even though it's a bench trial,
5 will have you come and see me first for a
6 mediation, so it may be voluntarily, it may be
7 not.

8 I guess the point being if it is
9 voluntary, I'd like to try to get you in on your
10 schedule. If it's not, then you're just going to
11 have to get you folks here on my schedule. Okay.

12 Let's talk about the protective order. I
13 keep forgetting. Is that -- so in what -- all
14 right. I didn't know if I needed to be prepared
15 to answer that question today about inside --
16 outside counsel -- in-house outside counsel or if
17 you're okay going forward for now without it and
18 then deciding it later. Sometimes those are full
19 blown formal motions and I don't know what we
20 have here.

21 MR. BERKOWITZ: Yes, I think right
22 now we're operating under a procedure where we
23 will get the documents and they won't be shown to
24 in-house counsel.

25 We would like, Your Honor, to take the

1 issue of now let me tell you what I think is
2 right and when I say now I don't mean we have to
3 decided today, but just set some sort of schedule
4 for discussing it on a relatively expedited
5 manner.

6 The third parties that are outstanding
7 include Merck, which is producing documents and
8 they have written a letter indicating that they
9 have no objection to in-house counsel getting
10 access to the documents, so we will proceed under
11 that assumption that there's an objection.

12 Another third party, Abbott, has
13 indicated that they would have an objection to us
14 getting access. One of the things we don't know
15 is given the overall size of Abbott's production,
16 what volume of documents within that production
17 we're truly talking about. Are there five
18 documents that are truly super secret that they
19 don't want our general counsel, who is a lawyer
20 and would be bound by the protective order under
21 the rules of ethics we believe fits with the
22 exception, but if there were five documents that
23 we're talking about and they really are trade

24 secret type things, maybe there could be an
25 agreement, but if they are going to designate

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1 half of the production, including documents
2 related to a transaction where we bought their
3 drug and our general counsel -- they could be
4 documents that frankly are documents that we have
5 seen before, we would like to know what we're
6 talking about and I think we could have a
7 productive either letter brief or something where
8 we identify really what it is our general
9 counsel's role is and why we believe he falls
10 outside of the situation where he makes any
11 competitive decision and would be allowed to do
12 that.

13 We would be happy to do that, but let's
14 first identify what we're talking about that
15 would be subject to this, because if it's really
16 small maybe we can have an agreement, but if it's
17 over broad -- our general counsel was very
18 important to the defense of his case and we would
19 like to talk with him about those documents.

20 THE COURT: Do you know at this point
21 what we're -- what the world looks like?

22 MR. CHADWICK: From Abbott we
23 actually haven't gotten yet their final
24 designation, so we're not sure about that. That
25 procedure makes sense.

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1 I guess I'm constrained a bit as to what
2 I can say because of the documents we have from
3 Ovation that are marked highly confidential, but
4 we have reason to object and to suggest that the
5 general counsel is involved in deal negotiations
6 and the like, so that does raise a concern on our
7 part.

8 MR. BERKOWITZ: Your Honor, we agree
9 with the FTC on this and we think we can wait and
10 let it -- it's still out a little bit.

11 THE COURT: Do I need to sign -- what
12 order do I need to sign? That's what my concern
13 was.

14 MALE SPEAKER: I guess you can sign
15 the -- I think there's a protective order that --

16 THE COURT: That just says not
17 agreed?

18 MALE SPEAKER: For now, yes. We
19 would like, Your Honor, with respect to setup a

20 schedule for resolving it, we will work in the
21 meantime to deal with it on this, but I think if
22 we could get a schedule for briefing on the issue
23 we can at least get that moving because it is
24 something that's important.

25 THE COURT: Briefing with -- with,

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1 you know, like affidavits and exhibits still
2 would be a lot faster than trying to get you on
3 my calendar, to be honest with you.

4 MALE SPEAKER: That's certainly
5 fine, Your Honor.

6 THE COURT: Would that be fine with
7 you guys?

8 MALE SPEAKER: Yes.

9 THE COURT: Okay. So from your point
10 of view, do I need to sign something right now in
11 order for the discovery to happen?

12 MALE SPEAKER: No. The reason -- we
13 stipulated to the protective order mutually with
14 the exception of that paragraph in order to have
15 a place holder so that -- so that discovery could
16 continue.

17 THE COURT: So the stipulation

18 goes --

19 MALE SPEAKER: The stipulation, as
20 far as we're concerned, is in place.

21 THE COURT: Okay. And then -- all
22 right. All right. Let's talk about when you --
23 because obviously that was my, in fact, concern.
24 I wasn't sure if I had a record yet to make any
25 decision about it, so we need to have that

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1 record. We'll, I will ask you folks, what are
2 you guys thinking about in terms of a couple of
3 weeks, tomorrow? No, not tomorrow.

4 MR. BERKOWITZ: I guess when are we
5 going to know what Abbott's designations are,
6 that might be helpful, but we can -- do we have a
7 sense as to that? I don't want to ask the other
8 side? I will ask you, can we get a sense as to
9 when Abbott will make their designation so that
10 we will see what we're talking about.

11 THE COURT: Can we get a sense of
12 when Abbott will be make it's designation so we
13 can see what we're talking about, is that --

14 MR. CHADWICK: Obviously we don't
15 control -- we know what Abbott has said. They

16 have told us early next week.

17 THE COURT: Okay. Good. So if we
18 did -- all right. So early next week you might
19 need some time to kind of sort through and then
20 figure out -- wait. Is it just going -- no, it's
21 going to --

22 MR. CHADWICK: They will tell us
23 what to designate as what. We can fairly rapidly
24 mark the things and then give them in electronic
25 form to Ovation, so that's not a big delay.

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1 THE COURT: Okay. So if we did do,
2 for example, -- if there's still a dispute, which
3 there may be as we move forward anyway, if we did
4 by the 20th, does that give everyone time to get
5 their acts together or -- this one really I am
6 fine talking to you about it because I'm -- we
7 can do like the -- we can do the 27th and the 8th
8 for -- no. That's not right. 27th or the -- and
9 the 13th for response or 27th and the 6th for
10 response?

11 MALE SPEAKER: I guess one of the
12 questions is who's going -- I think the burden
13 may be on the party resisting disclosure, so if

14 we're talking about them making the filing and us
15 responding, that's fine.

16 Is that what you were contemplating?

17 THE COURT: What is your position on
18 that?

19 MALE SPEAKER: Whatever the Court
20 prefers.

21 THE COURT: Then why don't we do it
22 that way. You can tell me what -- why don't you
23 do the first round of it on the 27th. Let's see,
24 what will we call this? Well, it's really a
25 protective order motion, so why don't you frame

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1 it as that so that we have something to docket.
2 So will the 27th give you enough time --

3 MALE SPEAKER: Yes, Your Honor.
4 Your Honor, it's conceivable this issue could
5 apply to other third parties as well.

6 THE COURT: Right, and so I want more
7 of a why overall that counsel should not be
8 getting --

9 MALE SPEAKER: I am wondering if --

10 THE COURT: Or doesn't that apply if
11 you have -- will there be different facts

12 depending on which one?

13 MALE SPEAKER: It could and I am
14 just wondering if it might be a more generic
15 issue. It could be a broader issue. I wonder if
16 we could just try to work it out with the other
17 side and then communicate with the Court at some
18 point in time, hopefully sooner rather than
19 later, if we can't work it out and then we can
20 identify what the issue is and the breadth of it
21 because at this point we don't know for sure and
22 we'd hate to do it piecemeal.

23 THE COURT: How many other thirds
24 parties are we talking about?

25 MALE SPEAKER: That's a little

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1 uncertain, as I understand it right now.

2 MR. BERKOWITZ: Your Honor, we will
3 always talk with the Government about how to
4 resolve this. I think if we had those dates in
5 place it will assist in having those dialogue --

6 THE COURT: But I see what he's
7 saying. If you're going to have them go first,
8 their facts over why he might -- is it he or she?
9 He?

10 MALE SPEAKER: He, Mr. Morris.

11 THE COURT: He will have -- I mean I
12 suppose there's a chance that Mr. Morris -- well,
13 I don't know. I don't know if there's a chance
14 that Mr. Morris maybe could see some, either
15 because of consent or because there's no evidence
16 to show that, you know, he was involved at all in
17 whatever or if as a general matter you think he
18 is not -- a competitive decision, doesn't make
19 competitive decisions and so therefore he should
20 be able to see all of it no matter who and if
21 that's the theory then you should go first. See,
22 that's the problem.

23 MALE SPEAKER: Right, exactly.

24 MALE SPEAKER: That's fine, Your
25 Honor. We'll go first and we'll do it on the

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1 27th. We have got an April 17th cutoff date and
2 it's very important to us that the issue gets
3 resolved. If that's the situation, what we would
4 like is a designation by some date next week as
5 to what it is with respect to the third parties
6 for whom they have documents.

7 THE COURT: Okay. Why don't we do

8 this, why don't we say -- I am going to say --
9 let's say by the 13th, which is the end of next
10 week, whatever -- we'll frame it as this, the
11 parties need to meet and confer by February 13th
12 to try to figure out what the universe is, at
13 least with the documents that they received.

14 Then by -- and I would say continue to
15 supplement that if you receive documents
16 thereafter, but -- and then by the 27th you
17 submit a briefing on why your in-house counsel
18 should be able to be included, maybe no matter
19 what or if you have (Unintelligible), that's
20 fine, but why he's not in a role that should
21 disqualify him and then you guys will respond by
22 the 6th, March 6, so it's a week after. Okay?

23 MALE SPEAKER: Yes, Your Honor.

24 THE COURT: All right. Good. And
25 then we'll get something out, if we need to, that

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1 following week so you know what's going on and
2 then hopefully that will be a good six weeks
3 before the end of discovery, five weeks. Okay.

4 Anything else we can do?

5 MR. BERKOWITZ: Briefly. I don't

6 think it is something that's ripe, I just want to
7 put it on the radar screen as a place holder, in
8 connection with our document request to the FTC
9 they have indicated that they intend to assert a
10 privilege over certain documents, including
11 deliberate process and attorney-client privilege.
12 We have asked for a log. We had some, I think,
13 productive discussions in that regard and they
14 have said -- we disagreed on the scope of what
15 that log is going to look like and they said why
16 don't you wait and see what we send you and if
17 it's not adequate, we can raise it to the Court,
18 so that's kind of where we are. I just want to
19 let you know we can do that by way of a letter if
20 we end up having a disagreement.

21 THE COURT: Right. Yes that would
22 be fine.

23 MR. GILBERT: We concur, Your Honor.

24 MR. CHADWICK: As do we.

25 THE COURT: All right. Anything else

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1 on behalf of the Government entities?

2 MR. GILBERT: No, Your Honor.

3 MR. CHADWICK: No, Your Honor.

4 MALE SPEAKER: Your Honor, with
5 respect to the third party documents, as I
6 understand it, they had a group of documents,
7 third party from the pre-complaint proceedings
8 and then are they going -- do they intend to get
9 more documents from the third parties to
10 designate, to ask them to designate other than
11 Merck, Abbott and Bedford?

12 MALE SPEAKER: Well, we issued
13 subpoenas, Your Honor. We have issued subpoenas
14 to which we have attached to a stipulated
15 protective order, so anything that comes in under
16 the protective orders those parties can designate
17 essentially for themselves, but we will -- once
18 we produce the Abbott material we will have
19 produced everything, cleared the decks from
20 pre-complaint and everything else will be in the
21 context of discovery in this case.

22 MALE SPEAKER: The FDA issue.

23 MALE SPEAKER: There's a statute that
24 protects the confidentiality of communications
25 between agencies and the FDA. There were

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1 communications. The FDA can waive that. We have

2 asked them to do that. We don't have much
3 leverage over when they respond, but we have
4 started that process. We would prefer obviously
5 that it not be an issue. We would like them to
6 waive the issue. We just haven't heard back.

7 THE COURT: Okay.

8 MALE SPEAKER: And our position on
9 that is what we don't want to have happen is on
10 April 16th them to waive the privilege, get it
11 and then it's like oh, my God, look what we have
12 now gotten and so obviously the FDA is not here.
13 We're not asking you to set a date by which they
14 do it, but if gets late in the discovery stage,
15 we're going to object to them using those
16 documents.

17 THE COURT: Yes. Let us know.
18 That's something you can maybe let us know.
19 While we can't order them to do anything,
20 sometimes, you know, you can make a phone call or
21 something.

22 MALE SPEAKER: You're a Federal
23 Judge.

24 THE COURT: With everyone on the
25 phone, yes.

1 MALE SPEAKER: We understand, Your
2 Honor.

3 THE COURT: All right. Very good.
4 Thank you all. We'll be in recess then. This
5 will come out -- the deadlines and all of that
6 will come out as a pre-trial scheduling order.

7 MALE SPEAKER: Thank you, Your Honor.

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1 STATE OF MINNESOTA)
) ss.
2 COUNTY OF DAKOTA)

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4 BE IT KNOWN, that I transcribed the
5 tape-recorded proceedings held at the time and place
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8 That the proceedings were recorded
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10 typewriting, that the transcript is a true record of
11 the proceedings, to the best of my ability;

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13 That I am not related to any of the
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S/ LESLIE PINGLEY

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